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No. 88

In the Supreme Court of the United States

October Term, 1958

EDGAR B. SIMS, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The oral opinion of the District Court (Pet. 11a-12a) is not reported. The opinion of the Court of Appeals (Pet. 1a-11a) is reported at 252 F. 2d 434.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1958. A petition for rehearing was denied on March 13, 1958. The petition for certiorari was filed June 7, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the auditor of the State of West Virginia is personally liable under Section 6332 of the Internal Revenue Code of 1954 for his refusal to surrender accrued wages of delinquent federal income taxpayers pursuant to notice of levy served on him under Section 6331 of the Code.

STATUTES INVOLVED

Sections 6321, 6331(a), 6332(a), (b) and (c), and 6334(a) and (c) of the Internal Revenue Code of 1954; and Art. VI, Sec. 35 of the Constitution of West Virginia are pertinent and portions of them are printed in the Appendix, *infra*, pp. 9-12.

STATEMENT

The facts were all stipulated (R. 20a-24a) and may be briefly summarized as follows:

Three employees of the State of West Virginia were indebted to the United States for income tax deficiencies upon earnings in endeavors apart from their state employment. The Commissioner of Internal Revenue made an assessment of tax deficiencies as to each and forwarded the assessments to the Collector of Internal Revenue at Parkersburg, West Virginia, for collection. The Collector demanded payment from each of them and, the deficiencies remaining unpaid for more than ten days, served on Edgar B. Sims, then auditor of West Virginia, notices of levy upon their accrued salaries, pursuant to Section 6331 of the Internal Revenue Code of 1954. (R. 20a-22a, 27a.) When the levies were made, the three

employees had accrued take-home pay totaling $519.71 (R. 23a).

On advice of the office of the Attorney General of West Virginia, the state auditor refused to honor the notices of levy and issued to each of the employees a warrant for the payment of his salary (R. 22a-23a; Pet. 2a).

Thereafter the Government brought suit to recover a sum equal to the value of the property not surrendered (R. 1a-12a). The suit originally was against the state auditor, individually and in his official capacity (R. 1a). On defendant's motion (R. 13a-14a), the action against him in his official capacity was dismissed (R. 15a-16a).

The District Court entered judgment against Sims in his individual capacity in the amount of $519.71 plus interest (R. 25a-26a). The judgment was affirmed on appeal (Pet. 1a-11a).

ARGUMENT

The decision below is correct on the basis of established principles of law. The conflicts alleged by petitioner (Pet. 15-18) are non-existent. Accordingly, the case does not present a question requiring review by this Court.

1. The case involves enforcement of the provisions of the Internal Revenue Code of 1954 for the collection of income taxes. Section 6321, Appendix *infra*, p. 9, establishes a lien for unpaid taxes "upon all property and rights to property" (except such property as is exempt under Section 6334). Section 6334, Appendix, *infra*, p. 11, enumerates specific exemp-

tions from levy and declares that, notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than those specifically enumerated. Section 6332(a), Appendix, *infra*, p. 10, requires "Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made" to "surrender such property or rights (or discharge such obligation)" upon demand. And Section 6332(b), Appendix, *infra*, p. 10, provides that "Any person who fails or refuses to surrender" such property upon demand "shall be liable in his own person and estate to the United States" in a sum equal to the value of the property plus costs and interest.

By its language, Section 6332(b) is applicable to petitioner, who, having been served with a notice of levy pursuant to Section 6331, failed to surrender accrued salary belonging to delinquent federal taxpayers. As the court below showed (Pet. 8a-9a), petitioner was the "person" in possession of and obligated with respect to the accrued salary upon which levy had been made. The lien established by Section 6321 and the levy authorized by Section 6331, Appendix, *infra*, p. 9, upon "all property and rights to property" applies to accrued salary. *United States* v. *Long Island Drug Co.*, 115 F. 2d 983 (C. A. 2d). As this Court has stated, "stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Glass City Bank* v. *United States*, 326 U. S. 265, 267.

The petitioner had possession of the accrued salary

and the fact that he acted only as a state official is immaterial. State sovereignty is not involved, it being well settled that a state officer, employee or agent can be required to collect federal taxes from private individuals and may be held individually liable for his failure to do so. *Allen* v. *Regents*, 304 U. S. 439, rehearing denied, 304 U.S. 590; *South Carolina* v. *United States*, 199 U. S. 437. And it is equally well settled that the word "person" in a federal statute applies to a state or state official unless a contrary Congressional intent is indicated. *Georgia* v. *Evans*, 316 U. S. 159; *Ohio* v. *Helvering*, 292 U. S. 360; *Wilmette Park Dist.* v. *Campbell*, 338 U. S. 411. Here there is no contrary intent and, as the court below noted (Pet. 8a-9a), the very definition of "person" in Section 6332 imposes liability on an individual "in his own person and estate" for a failure with respect to property held in a representative capacity.

There is no constitutional requirement that the salaries of state employees be treated differently from the salaries of others. *Helvering* v. *Gerhardt*, 304 U. S. 405; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466. Thus, two courts have squarely held that money owed by a state to a delinquent taxpayer is subject to the federal tax lien. *United States* v. *Graham*, 96 F. Supp. 318 (S. D. Cal.), affirmed *per curiam sub nom. California* v. *United States*, 195 F. 2d 530 (C. A. 9th), certiorari denied, 344 U. S. 831 (rent); *United States* v. *Newhard*, 128 F. Supp. 805 (W. D. Pa.) (accrued wages). As a matter of fact, West Virginia, the State involved here, has by constitutional amendment authorized garnishment suits against it.

Constitution of West Virginia, Article VI, Section 35, Appendix, *infra*, p. 12. Federal levy is analogous to garnishment and the United States certainly has the remedies enjoyed by one of her citizens, although it is, of course, not required to use state procedures. *United States* v. *Bess*, Nos. 395, 410, Oct. Term, 1957, decided June 9, 1958.

Petitioner has nevertheless contended that, as a matter of statutory construction, Sections 6331 and 6332 do not apply to the wages of state employees. But the decision below fully and conclusively refutes that contention. Indeed, as the court below noted (Pet. 5a-6a), in 1950, in amending Section 6331 to authorize levy upon the wages of *federal* employees (as to which *Smith* v. *Jackson*, 246 U. S. 388, had been a stumbling block, see Pet. 6a-7a), Congress legislated with knowledge and approval of the practice of the Internal Revenue Service of applying the existing statutes to the wages of *state* employees by levy against state officials holding money due delinquent federal taxpayers.

2. The alleged conflicts are non-existent. *United States* v. *Railroad Co.*, 17 Wall. 322, is not in point; it held only that a municipal corporation, as a portion of the sovereign power of a state, is not subject to federal tax. *Crooks* v. *Harrelson*, 282 U. S. 55, involving the federal estate tax, is relied upon as requiring acceptance of the literal meaning of the word "person" in Section 6332 even though the result be absurd. But the word "person" in Section 6332, both literally and otherwise, includes a state official. Moreover, the applicable rule, as already shown (*supra*, p.

5), is that the word "person" is a federal statute includes a state or state official unless a contrary legislative intent is reflected. *Cooper* v. *O'Connor*, 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643, rehearing denied, 305 U. S. 673, and 307 U.S. 651, cited as in "direct" conflict with the decision below (Pet. 18), was a suit for malicious prosecution against officers and employees of the United States in their individual capacities. Here we are concerned with the personal liability of an agent of a state to the United States. It is well settled that the agent of a sovereign can properly claim immunity from personal liability only if the relief requested is against the sovereign and if the sovereign is immune from suit. *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 686-688. Here there is no immunity for two reasons; the State is not immune from suit by the United States (*United States* v. *Texas*, 143 U. S. 621; *Monaco* v. *Mississippi*, 292 U. S. 313, 329) and the relief requested is not against the state. As already noted (*supra*, p. 5), this Court has held that the fact that individuals are acting as agents of a state does not relieve them from personal liability for the collection or payment of a federal tax.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C., Supp. V, 6321.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary or his delegate makes

a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

* * * *

(26 U. S. C., Supp. V, 6331.)

SEC. 6332. SURRENDER OF PROPERTY SUBJECT TO LEVY.

(a) *Requirement.*—Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary or his delegate, surrender such property or rights (or discharge such obligation) to the Secretary or his delegate, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) *Penalty for Violation.*—Any person who fails or refuses to surrender as required by subsection (a) any property or rights to property, subject to levy, upon demand by the Secretary or his delegate, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of the taxes for the collection of which such levy has been made, together with costs and interest on such sum at the rate of 6 percent per annum from the date of such levy.

(c) *Person Defined.*—The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or em-

ployee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

(26 U. S. C., Supp. V, 6332.)

SEC. 6334. PROPERTY EXEMPT FROM LEVY.

(a) *Enumeration.*—There shall be exempt from levy—

(1) *Wearing Apparel and School Books.*—Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) *Fuel, Provisions, Furniture, and Personal Effects.*—If the taxpayer is the head of a family, so much of the fuel, provisions, furniture, and personal effects in his household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $500 in value;

(3) *Books and Tools of a Trade, Business, or Profession.*—So many of the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $250 in value.

* * * *

(c) *No Other Property Exempt.*—Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

(26 U. S. C., Supp. V, 6334.)

Constitution of West Virginia:

ARTICLE VI

* * * *

Section 35. The State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee. (House Joint Resolution No. 3, Acts 1935, p. 662; 1935, c. 23. Ratified.)

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